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IN THE

Supreme Court of the United States

No. 331.

October Term, 1947.

RUDY E. CALLEN,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania (R. 306) is not reported. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 313) is reported in 162 Fed. 2d 832.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Sec. 347 (a).

QUESTIONS PRESENTED.

(1) Whether the Circuit Court of Appeals erred in granting a new trial on the ground that the Trial Court had committed reversible error in its instructions to the jury by (a) withdrawing from the jury the question whether a release given by the petitioner to respondent was intended by the parties to cover all claims arising out of the alleged injury and (b) in instructing the jury that there was no

dispute about the permanency of the alleged injury despite the fact that this was a controverted issue of fact.

(2) Whether the Circuit Court of Appeals should not have granted a new trial on the further grounds that (a) the Trial Court's charge was unduly prejudicial to the respondent and unduly favorable to the petitioner and (b) the Trial Court erred in its refusal to withdraw a juror after it had injected into the case the question of what passengers on a passenger train might think of an operating practice, which was a controversial issue not raised by the pleadings or evidence.

STATEMENT OF THE CASE.

Petitioner brought a suit under the Federal Employers' Liability Act to recover for an injury to his back alleged to have been received on December 14, 1944. The complaint alleged that the injury was incurred when the petitioner was forced to jump from an engine to the ground as a result of the negligence of the respondent (R. 4a-6a).

At the trial, petitioner testified that he had twisted his back on December 14, 1944 when he had jumped from a tender which was about to make a coupling with standing cars and was moving so fast that he thought the coupling operation unsafe (R. 19a).

However, respondent offered evidence that petitioner did not work for respondent on December 14, 1944 (R. 146a, 206a, 237a), that petitioner advised a conductor employed by respondent, a few days after December 14, 1944, that he had not worked on December 12th or 14th because he was shoveling snow to get his car out of the garage, and that he had told his conductor that he hurt his back "throwing the derail" (R. 147a).

It was shown that, in a statement given to the respondent's claim agent prior to the settlement and compromise of the claim, the petitioner stated that while engaged in a switching operation he jumped off a tender and his left

foot may have landed on some ice, but that he did not know what made him slip (R. 81a). In the same statement, the petitioner stated that the engine was moving at a "moderately fast walking pace" and was moving slower than many engines from which he had jumped (R. 79a, 80a).

At the trial, respondent showed that the coupling operation was effected at a speed of less than two miles per hour and this testimony was in part corroborated by the petitioner, who acknowledged that no damage resulted to the equipment (R. 19a, 83a, 154a, 193a, 219a, 224a). Petitioner's own expert witness testified that coupling at a speed greater than a mile and a half per hour was likely to damage the equipment (R. 94a).

Respondent pleaded a release of all claims arising from the injury, executed by the petitioner for a payment of $250. Petitioner testified that on February 14, 1945 he had executed this full release of all claims for injuries sustained in the accident but gave as his excuse for doing so that the respondent's claim agent had said there was nothing wrong with him and that he could go back to work (R. 27a). He testified that he had done this although his back had pained him severely during the period that he was receiving chiropractic treatment (R. 23a) which was the two month period from the date of the alleged accident to the time when he executed the release. He further testified that at the very time when he executed the release his back pained him so that he could hardly sit on a chair (R. 26a) and that he had procured and brought with him to the settlement a report (Defendant's Exhibit 3, R. 259a, 274a) by one of his own doctors dated February 13, 1944 (the day before the execution of the release) showing that he was suffering from "nerve pressure and inflammation in sacro illiac and lower lumbar region of the spine." Petitioner's doctor's report further indicated that the petitioner had not been discharged at the time of the execution of the release and that the injury "leaves a weakness which is more readily increased and makes him more susceptible to

recurrence." Petitioner also testified that he had read and understood the release and intended to waive any further claim against the respondent (R. 54a, 55a).

Respondent's evidence indicated that the agreement for the release was made because even the petitioner's version of the alleged accident, given to the respondent's claim agent at the time of the settlement, showed no negligence or liability on the part of the respondent and that the amount paid in settlement was determined accordingly (R. 248a, 251a, 253a, 256a, 257a).

The pleadings raised the issue whether the petitioner's injuries were permanent (R. 4a-8a). At the trial, petitioner called two doctors. One, Dr. Sheets, petitioner's family physician (R. 128a), treated him both before and after the date of the release (R. 124a, 126a). On his first examination, before the release was executed, Dr. Sheets found a large amount of spasticity of the muscle in the sacroiliac region, petitioner was given tests "to determine the condition of the sacroiliac subluxation," his ligaments were found to be torn, and petitioner was taped and given a narcotic for his pain (R. 124a, 125a). Thus Dr. Sheets' initial examination showed the same injuries as those described by the report (Defendant's Exhibit 3, R. 259a, 274a) which petitioner later obtained from Dr. Fair and furnished to the respondent at the time the release was executed. Dr. Sheets' later examinations, after the release was executed, showed the same conditions that he had found at the time of the first examination (R. 126a-128a, 130a). The other doctor, Dr. Jepson, saw petitioner after the execution of the release (R. 115a, 116a). His diagnosis was chronic low back strain, the same condition that had been described by Dr. Sheets and by Dr. Fair's report, but he testified that he could not say whether or not the condition was permanent (R. 116a, 117a). Respondent presented no medical evidence. A chart or a diagram analysis of the testimony and evidence concerning plaintiff's condition, both before and

after the date of execution of the release, is set forth below at page 15.

On the question of the validity and scope of the release, the Trial Judge charged the jury that the release was not binding on the petitioner for and did not cover permanent injuries, so that the jury should merely subtract the consideration for the release ($250) from their verdict if they should find for the petitioner (R. 281a, 282a). The Trial Judge also assumed in his charge that petitioner was suffering from permanent injuries (R. 281a, 282a), although this was one of the controverted issues, as to which petitioner's own doctors were in disagreement. Respondent's points for charge requested a number of instructions to the jury concerning the validity and effect of the release (R. 299a, 300a), and some of these were read to the jury by the Trial Judge (R. 288a-290a) despite their inconsistency with the portions of the charge which had removed the question of the validity and effect of the release from the jury's consideration (R. 281a, 282a). However, the court qualified the sixth point submitted by the respondent, which was the point most closely related to the issues and evidence in the case concerning the release, the qualification indicating that the jury should not regard the release as covering the permanent injuries which the court's charge assumed existed (R. 289a). Respondent duly excepted to this qualification and to the court's assumption that petitioner's injuries were permanent (R. 293a, 295a, 296a).

During the trial, the court refused to withdraw a juror at respondent's request, after the court had commented concerning whether or not passengers in a train would consider it a safe practice for an engine to back up against traffic without a brakeman riding on the rear step of the tender of the engine (R. 165a, 166a, 167a). The movement in which petitioner claimed to have received his injury was a movement of a freight engine, and there was no evidence that any passengers or passenger trains were in the least

involved, so that the question of passenger safety was not an issue in the case. In addition, respondent excepted to the charge as being unduly favorable to the petitioner, as emphasizing the petitioner's case and as being prejudicial to the respondent, and took a number of specific exceptions to parts of the charge which were objectionable in this respect. (R. 293a, 295a, 296a, 297a). The objectionable portions of the charge are discussed fully below, at pages 32 to 39.

Respondent's motion for a directed verdict (R. 303a) was denied and the jury returned a verdict for the petitioner in the sum of $24,990.00. Thereafter, respondent duly filed its motion for a new trial (R. 305a). Respondent's motion was refused and an appeal to the Circuit Court followed. Respondent raised the issue of the instructions concerning the release in its statement of points on which it intended to rely in the Circuit Court and this was argued at length both in the briefs and at the oral argument in the Circuit Court (Appellant's brief below, pp. 1, 6-16). The question of the errors in the charge concerning the permanency of petitioner's injuries was also argued extensively in the briefs and at the argument in the Circuit Court (Appellant's brief below, pp. 1, 16-17). In addition, respondent urged that a new trial should be granted because the charge was unduly prejudicial to the respondent and unduly favorable to the petitioner, and because of the court's refusal to withdraw a juror at respondent's request (Appellant's brief below, pp. 1, 17-26).

The Circuit Court of Appeals reversed the judgment of the District Court and directed a new trial because of the errors committed by the Trial Judge in his charge concerning the release and concerning the permanence of the injuries (R. 315, 317, 318), all of which were so confusing as to deprive respondent of a fair determination of the factual issues. The Circuit Court stated that it did not find substantial error as to the remaining points urged before it by the respondent (R. 318).

ARGUMENT.

Summary.

(1) The Circuit Court properly granted a new trial because the Trial Judge's charge erroneously removed from the jury's consideration the question of whether or not the release was executed under mutual mistake as to the nature of petitioner's injury. Although there was some evidence of mutual mistake in the execution of the release, there was also substantial evidence to show that, at the time the release was executed, petitioner had full knowledge of the nature and extent of his injury, which was the same injury complained of at the trial. Thus there was an issue of fact to be determined by the jury under proper instructions from the Trial Court. Not only did the Trial Court remove this question from the jury's consideration, but it failed to instruct the jury that, under the controlling federal decisions, clear, unequivocal, and convincing evidence of mistake is necessary to avoid a release. The rule in seamen's cases concerning the burden of proof for avoidance of a release is not applicable to cases under the Federal Employers' Liability Act. Section 5 of the Federal Employers' Liability Act has no bearing on bona fide settlements of claims for personal injuries arising under the statute (pp. 9-23, *infra*).

(2) The Circuit Court properly granted a new trial because the Trial Judge, in his charge, improperly assumed that petitioner's injuries were permanent. The permanence of the injuries was one of the substantial issues in the case and was not admitted by the respondent. Petitioner's own medical testimony was in disagreement as to whether or not the injuries were permanent so that any assumption that the injuries were permanent was improper and this question should have been left to the jury (pp. 24-27, *infra*).

(3) The respondent duly raised, both at the trial and on appeal, the errors in the Trial Court's charge. The re-

spondent had requested a number of points for charge predicated on the proposition that the jury should decide whether or not the release was executed under a mutual mistake of fact. The Trial Judge's charge improperly removed this issue from the jury's consideration by instructing the jury that the release, despite its terminology, was not binding as to permanent injuries. Since respondent's position had already been made clear in its requested points for charge, no further steps were necessary to preserve the question of the propriety of this portion of the charge for appeal. The Trial Judge's charge assumed that the injuries involved were permanent, although this was a controverted issue under the pleadings and evidence. Respondent duly excepted to this assumption in the charge. Both the failure of the Trial Court to submit the issue of mistake concerning the release and the erroneous assumption of the permanency of the injuries were raised by respondent in its motion for new trial and on appeal, so that these matters were properly before the Circuit Court as a basis for the grant of a new trial. Even if these points had not been duly raised at the trial and on appeal, the errors in the charge were fundamental, so that the Circuit Court had the power to grant a new trial because of them (pp. 27-31, *infra*).

(4) A new trial should have been granted because the charge of the Trial Court, in numerous respects, was unduly prejudicial to the respondent. The charge tended to excite sympathy for the petitioner and prejudice against the respondent by reference to the respondent's prosperity and to the hazardous nature of petitioner's occupation, by allusions to fraud on the part of respondent, and by emphasis on petitioner's testimony and virtual disregard of the testimony offered on behalf of the respondent. A new trial should also have been granted because the Trial Court refused to withdraw a juror after it had injected into the case a controversial issue concerning passenger safety, which was not, in any way, involved in the instant case (pp. 32-39, *infra*).

I. The Circuit Court Properly Granted a New Trial Because the Trial Judge Erroneously Charged That the Release Given by Petitioner to Respondent Was Not Binding.

The Trial Judge, in the portion of his charge dealing with the defense of the release, in effect gave the jury binding instructions that the release was not effective and that the jury should merely deduct the $250.00 paid to petitioner by respondent from any amount which they might award petitioner. Thus the Trial Judge stated (R. 281a, 282a):

> "Anyhow, they settled to the extent of $250.00 and the release has been offered in evidence and admitted, *and both sides agree that the release was not in contemplation of any sort of permanent injury.*
>
> * * *
>
> *"Now, I am going to consider that release as binding to the amount of $250.00, and if you find a verdict for the plaintiff you will deduct that from any amount you would otherwise give him. The $250.00 he got for expenses and medical bills and services that he obtained up to that time;* and if you find that he is entitled to a verdict at your hands *I will ask you to deduct that $250.00 from any amount you otherwise would award him, because that is what he agreed to take toward that particular phase of his claim,* and of course he would not and does not ask, as I understand it, to be excused from that,—he admits that he got it, and there it is.
>
> *"The release,* as I have told the attorneys for both sides, *I do not consider binding insofar as it applies to his permanent injuries,* because the Pennsylvania Railroad certainly didn't know he was permanently injured. . . ." (Emphasis supplied.)

In so charging the jury the entire question of what the release was intended to cover and whether or not the release was executed under mutual mistake of fact was removed

from their consideration. The Circuit Court commented on this portion of the charge as follows (R. 317):

> "Prior to charging appellant's points above quoted, the District Judge had advised the jury that the release was not binding in so far as it applied to appellee's permanent injuries. This was palpable error under the facts relating to the release and entirely aside from the Court's incorrect assumption that there was no dispute about the permanency of the injuries."

Thus the failure to submit this issue to the jury was one of the principal grounds for the grant of a new trial. This is separate and distinct from the question of who bore the burden of proof on this issue. The grant of a new trial was not based on error as to the burden of proof in instructions submitting the question to the jury, but was based on the fact that the Trial Court did not even submit the question to the jury, regardless of who had the burden of proof. Thus much of the argument in petitioner's brief, concerning the question of burden of proof, is not truly pertinent to the case. Careful examination of the opinion of the Circuit Court fails to reveal any discussion of the question of burden of proof concerning the release transaction. The Circuit Court merely said, in its opinion, that clear, unequivocal, and convincing evidence is necessary to void a release, and that it was for the jury to determine whether these conditions had been fulfilled (R. 315, 317). This, in effect, was merely a statement as to the *quantum* of proof, not as to the burden of proof. It is submitted that the Circuit Court's views, on this point, were correct and that, had the issue been left to the jury, it should have been submitted on such instructions.

It is undisputed that, since the instant case arose under the Federal Employers' Liability Act, the question of whether or not the release given by the petitioner to the respondent was effective is governed by Federal Law. See *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (1942); *Ricketts v. P. R. R. Co.*, 153 F. 2d 757 (C. C. A. 2d, 1946).

Petitioner urges that the Circuit Court applied the Pennsylvania rule concerning releases rather than federal decisional law (Petitioner's brief, p. 9), but an examination of the court's opinion makes it completely clear that the court was applying Federal Law. The Circuit Court cited only Federal cases and the Restatement of Contracts (R. 315) and it was conceded both by petitioner and respondent, in the argument before the Circuit Court, that the Federal Law was controlling (Appellant's brief below, p. 7).

The Federal Law concerning the grounds for avoiding a release is clear. As was said in **Chicago & N. W. Ry. v. Wilcox, 116 F. 913, 914 (C. C. A. 8th, 1902)**:

> "The burden is always upon the assailant of the contract to establish the vice which he alleges induced it, and a bare preponderance of evidence will not sustain the burden. *A written agreement of settlement and release may not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is clear, unequivocal, and convincing.*" (Emphasis supplied.)

The rule of the Wilcox case was expressly affirmed in **Lion Oil Refining Co. v. Albritton, 21 F. 2d 280, 282 (C. C. A. 8th, 1927)**. Similarly, in **Atlantic Greyhound Lines v. Metz, 70 F. 2d 166, 168 (C. C. A. 4th, 1934)**, the court, even in permitting the avoidance of a release, said:

> "The evidence *clearly* shows that, at the time of the execution of the release, both plaintiff and the claim agent were entirely ignorant of the serious abdominal injuries which plaintiff had sustained . . ." (Emphasis supplied.)

The law concerning avoidance of a release for mutual mistake of fact is summarized in the *Restatement of Contracts*, Section 502, as follows:

> ". . . where parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is

> voidable by either party if enforcement of it would be materially more onerous to him than it would have been had the fact been as the parties believed it to be . . ."

Under the principles outlined in the *Restatement*, which correspond with those enunciated in the Federal decisions, a contract (or release) can be avoided only if (a) both parties are mistaken regarding a fact, and (b) the fact as to which the mistake exists is the basis, or vitally affects the basis, upon which the parties contracted (see *Restatement of Contracts*, Section 502, Comments a and e).

The *Restatement of Contracts* illustrates the application of these principles to a release of a personal injury claim as follows (*Restatement of Contracts*, Section 504, Illustration 4):

> "A is injured in an accident negligently caused by B. Immediately after the accident A releases B from all liability for the injury in consideration of $100 paid him. The accident is assumed by both parties to have caused only a slight scalp wound, but proves to have caused permanent spinal disease. The release will be reformed so as to cover only damages for the slight wound that was all that the parties had in mind."

It codifies the principles governing the *quantum* of proof necessary to avoid a release on the grounds of mistake as follows (*Restatement of Contracts*, Section 511):

> "It is essential in order to obtain a decree rescinding or reforming a written conveyance, contract, assignment or discharge for mistake, that the facts necessary for the allowance of the remedy shall be proved by *clear and convincing evidence and not by a mere preponderance.*" (Emphasis supplied.)

Petitioner's assertion that "the Wilcox case is more revered for its antiquity than for its authoritativeness or its scholarliness" (Petitioner's brief, p. 16) cannot be reconciled with the fact that the same rule announced in

that case concerning the type of evidence necessary for avoidance of a release has been adopted by the *Restatement of Contracts*.

Petitioner's contention, in the instant case, was that the release should be avoided because of mutual mistake of fact as to the nature and extent of petitioner's injury. The Circuit Court of Appeals reversed and ordered a new trial because the District Court did not submit this issue to the jury with proper instructions. It cannot be said that this action of the Circuit Court was erroneous unless it is to be concluded that the evidence of mistake was so overwhelming that the District Court was justified in withdrawing the question of fact from the jury and in instructing the jury, *as a matter of law*, that the release was not binding as to any permanent injuries that the petitioner may have suffered. A review of the evidence on the issue of mistake shows that there was an issue of fact for the jury. Indeed, we submit that if any question is to be raised as to the sufficiency of the evidence the question should rather be whether there was enough evidence to support the petitioner's position to warrant the submission of the evidence to the jury. In other words it seems to us that the Trial Court might have been justified in instructing the jury that, as a matter of law, there was no clear and convincing evidence of the alleged mistake of fact, but regardless of whether we are correct in this latter conclusion, the evidence at least raised an issue of fact which the respondent was entitled to have submitted to the jury.

Although petitioner claimed that the reason he executed the release was that he was advised by Mr. Veidt, respondent's claim agent, that there was nothing wrong with him and he could go back to work (R. 27a), petitioner's testimony, taken as a whole, shows that this was not the fact. He testified that his back had pained him terribly for the two-month period from the date of the accident to the time the release was executed (R. 23a), and he stated that, at the very time of the execution of the release, his back pained him so that he could hardly sit on a chair (R. 26a).

In addition to the fact that petitioner's own testimony showed that he had full knowledge of the nature and extent of his injuries, both from the subjective symptoms of pain which he had undergone and from the necessity for treatment to his back, the medical testimony in the case, together with the report of petitioner's doctor furnished to respondent by petitioner (Defendant's Exhibit 3, R. 259a, 274a) showed clearly that, at the time the petitioner executed the release, he was fully aware of the fact that he had a back injury of the very nature described at the time of the trial and for which his claim at the trial was made. Furthermore, as to petitioner's knowledge of his condition, one of the members of his crew testified that on December 20, 1944, only six days after the accident is claimed to have occurred, petitioner complained of torn ligaments in his back (R. 147a), which was the same condition found and described by petitioner's family doctor both before and after the date of execution of the release (R. 124a, 130a).

A comparison of the information contained in Dr. Fair's report (Defendant's Exhibit 3, R. 259a, 274a) and of the testimony of petitioner's family physician, Dr. Sheets, who testified concerning petitioner's condition when he was examined shortly after the accident and prior to the execution of the release (R. 123a-126a), with the testimony of Dr. Sheets (R. 126a-136a) and Dr. Jepson (R. 114a-122a) concerning petitioner's condition at the time of examinations subsequent to the execution of the release and up to the time of the trial, shows that petitioner, at the time he executed the release, had full knowledge, from his own doctors, of the very injuries for which he sought compensation at the time of the trial. A chart or diagram showing, in the first two columns, petitioner's condition as disclosed by Dr. Fair's report and Dr. Sheets' examination before the date of execution of the release and showing, in the next two columns, his condition subsequent to the date of the release and up to the time of trial is attached, on the opposite page, for purposes of comparison. This clearly

	Examinations before execution of release		Examinations after date of release	
Name of Doctor	C. R. Fair (Defendant's Exhibit 3—R. 274a)	R. L. Sheets (first examination—R. 123a-126a)	R. L. Sheets (subsequent examinations—R. 126a-136a)	Paul N. Jepson (R. 114a-122a)
Specialty	Chiropractor	Surgery—plaintiff's family physician (R. 128a)	Surgery—plaintiff's family physician	Orthopedic surgeon
Dates of Examination	15 or 16 times between Dec. 28, 1944 & Feb. 13, 1945 (R. 23a)	Late December 1944	Visits from March 1945 to June 1945 and from Oct. 1945 to date of trial	July 3rd & 5th and Oct. 2, 1945; March 11, 1946 and May 21, 1946
Diagnosis	Nerve pressure and inflammation of sacroiliac and lumbar region of spine	Spasticity of muscle of sacroiliac region Sacroiliac subluxation—torn ligaments	Low back strain known as sacroiliac subluxation—damaged ligaments	Restricted motion of back, muscle spasm, low back strain of chronic nature at the sacroiliac junction, 15% limited motion
Treatment	Chiropractic adjustment to remove pressure	Taped back—rest—anodine for pain	Taped back, applied heat to back, narcotic to relieve pain	Massage, baking, fracture boards
Prognosis	Weakness which is readily increased and makes plaintiff susceptible to recurrence—patient not discharged	None	Condition permanent with 15 to 20% disability	Unable to state whether condition temporary or permanent, but patient predisposed to low back strain
Remarks			Psychogenic change and loss of weight because of fear that back condition is permanent.	Extent of disability, restriction of motion and muscle spasm varied substantially from visit to visit

shows that there was no change in the petitioner's back condition subsequent to the time the release was executed, that petitioner had full knowledge of his injuries at the time the release was executed and that, accordingly, there was no mutual mistake of fact.

Although, at the trial, petitioner made much of the fact that the alleged statements of Mr. Veidt, respondent's claim agent, concerning petitioner's injuries were made after petitioner's back had been X-rayed and before the release was executed (R. 26a, 137a, 138a), petitioner acknowledged that later on the same day, subsequent to his execution of the release, he had stated to respondent's trainmaster that he did not know whether he had any broken bones because no report of the X-ray examination had yet been received (R. 78a, 79a, 137a). Thus it is clear that petitioner did not understand any of the remarks made to him by Mr. Veidt as being based on the X-rays which were taken. Furthermore, at the time of giving that statement, *after* the settlement had been effected, petitioner was uncertain as to whether or not he had any broken bones, although actually he had none (Plaintiff's Exhibit 6, R. 260a, 271a), but he did know from his own doctors and his own senses, as a result of the pain he says he then suffered, that he had an injury in the lower back or sacroiliac region. In other words, at the time the settlement was effected, petitioner was uncertain as to whether or not he had any broken bones, but thought that such a possibility existed. However, he was fully aware of the back strain of which he now complains, and which is the only injury now claimed to have occurred to him. He thus had full knowledge of the injury, the claim for which was released, and there was no mutual mistake of fact.

The transaction is readily understood by an examination of the testimony of respondent's claim agent, Mr. Veidt. He testified that the question of the extent of petitioner's injury was not a material consideration in the set-

tlement and release transaction but that the settlement figure was arrived at and the release executed because, on the petitioner's own version of the accident, the facts did not disclose any liability or negligence of the respondent (R. 248a, 251a, 253a, 256a, 257a). Mr. Veidt denied telling petitioner that there was nothing wrong with him and he could go back to work (R. 249a). Of course, since Mr. Veidt had the doctor's report before him, he knew of petitioner's claimed back injury (R. 249a) but was concerned not with the extent of the injury but with the question of liability. In other words, the nature and extent of petitioner's injury did not, in the language of the *Restatement of Contracts,* Section 502 Comment e, "vitally affect the basis" upon which Mr. Veidt entered into the release transaction, so that, even if there had been any mistake by petitioner as to his injury there was no *mutual* mistake as to a material present fact.

It is submitted that the Circuit Court properly held that a new trial should be granted because of the failure of the Trial Judge to submit to the jury the question of whether or not the release was executed under a mutual mistake of fact. It would seem that the evidence offered on the point was insufficient to satisfy the rule of the Federal decisions requiring clear, unequivocal, and convincing evidence of mistake. Even if it could be contended that respondent was not entitled to binding instructions on the ground that petitioner was barred by the release, still there can be no doubt that respondent was at least entitled to have the jury pass on the issue and on the credibility of petitioner's version of the incident.

Petitioner urges that the decision of the Circuit Court in the instant case is in direct conflict with decisions of the Circuit Court of Appeals for the Second Circuit (Petitioner's brief, pp. 8, 9, 16, 17). This, of course, is in connection with petitioner's suggestion that the Circuit Court granted a new trial because of the failure of the Trial Judge to charge that petitioner had the burden of proving

mistake by "clear, unequivocal, and convincing" evidence as required by the *Wilcox* case. As has already been shown, the error on the basis of which the new trial was granted was not the failure to charge on the burden of proof but the failure to submit to the jury the issue of mistake. However, the cases relied on by petitioner do not reveal any conflict between the *Wilcox* case and the decisions in the Second Circuit, as to the burden of proof.

Petitioner cites the case of *Steele v. Erie R. R.*, 54 F. 2d 688 (W. D. N. Y., 1930), affirmed *per curiam* 54 F. 2d 690 (C. C. A. 2d, 1931), as illustrating the conflict. However, in that case, which was tried without a jury, the Trial Judge specifically found that the release involved was executed under a mutual mistake as to the nature of the injury. The point at issue was whether or not petitioner's mistaken belief that his injury would be cured within several weeks, which belief was based on the *opinion* of his doctor, constituted a mistake of *fact* such as would permit avoidance of a release. On this point alone, the District Court indicated that it would not follow the *Wilcox* case in which it had been held, not only that clear and convincing evidence of mistake must be presented in order to avoid a release, but also that a mistake in estimate of the duration of a disability constitutes a mistake in prophecy or opinion which is insufficient to warrant avoidance of a release on the ground of mutual mistake of *fact*. The District Court in the *Steele v. Erie* case did not in any way intimate disagreement with the requirement of clear and convincing evidence for avoidance of a release. It did indicate its preference for the concurring opinion in the *Wilcox* case, in which opinion Circuit Judge Thayer had disagreed with the majority concerning the difference between opinion and fact, but had stated that (116 Fed. 919):

> "I concur in the view expressed in the foregoing opinion that the evidence which is relied upon by the

complainant below . . . is altogether too uncertain, conflicting, and unsatisfactory to warrant a court in setting aside a release . . . the settlement in question ought not to be annulled, except on *clear proof* that it was obtained either by imposition or fraud, or while the complainant was laboring under some serious mistake of fact, for which the railroad company was in some measure responsible . . . I agree to the reversal of the judgment below on the ground last indicated, namely, that the testimony is insufficient to annul the release on the ground of fraud or mistake, . . ." (Emphasis supplied.)

The opinion of the Circuit Court in the *Steele v. Erie* case was merely a *per curiam* opinion and, since the only issue presented to it was the question of whether or not a mistaken belief as to future disability can be regarded as a mistake of fact, the Circuit Court's opinion cannot be regarded as a holding on the question of the *quantum* of proof necessary for avoidance of a release. The conflict asserted by petitioner is accordingly illusory.

In *Scheer v. Rockne Motors Corp.*, 68 F. 2d 942 (C. C. A. 2d, 1934), also relied on by petitioner, the issue, again, insofar as a release was involved, was whether mistake as to the duration of disability should be regarded as a mistake of fact or as a mere mistake of opinion. On this point the court adopted the reasoning of the concurring opinion in the *Wilcox* case but did not, in the least, indicate any disapproval of the general principle announced in the *Wilcox* case covering the type of proof necessary for avoidance of a release.

Petitioner also relies on the case of *Ricketts v. P. R. R.*, 153 F. 2d, 757 (C. C. A. 2d, 1946). In that case the court's opinion was written by Judge Learned Hand, a concurring opinion was written by Judge Frank, and Judge Swan dissented. Again, however, the issue in the case did not, in any way, involve the *quantum* of proof necessary for avoid-

ance of the release, and the court's opinion dealt with the question of whether a general release could be avoided where it had been executed without having been read by one who acted on the advice of an attorney authorized only to adjust a claim for back wages. Judge Frank wrote a long concurring opinion in which he urged that the existing rule concerning releases in cases arising under the Federal Employers' Liability Act should be abandoned in favor of the rule prevailing in Admiralty cases. Thus his opinion, in effect, is a recognition of the fact that the Circuit Court's opinion in the instant case is in accord with the decisions in other circuits and that petitioner's contention that there is a conflict of decisions on the point is completely without merit. There is no suggestion in Judge Frank's opinion that the question of mistake in the execution of a release should not be submitted to the jury, although he urges that the rule concerning the burden of proof should be changed. Even if, as petitioner contends, the rule of the *Wilcox* case requiring clear, unequivocal, and convincing evidence of fraud or mistake in order to avoid a release should be relaxed, it certainly could not be suggested that the person asserting the release is not entitled to have the jury consider the evidence concerning the issues of fraud or mistake, whether the burden of proof be placed on the person asserting the defense of the release or on the person seeking to avoid it.

Petitioner also contends that this Court, in its decision in the case of *Garrett v. Moore-McCormack* Co., 317 U. S. 239 (1942), indicated that the rule which is applicable in cases involving releases executed by seamen should be applied to cases arising under the Federal Employers' Liability Act. In support of this contention, it relies on footnote 17 to the opinion in the *Garrett* case. In the *Garrett* case, this Court discussed the long-standing solicitude of the courts for seamen and the well recognized rule that, in Admiralty, the burden of sustaining a release executed by a seaman is on the person asserting the release as a de-

fense. It was pointed out that this result follows from the theory that seamen are the wards of the Admiralty courts. Of course, there is no similar doctrine as to railroad employees and the historical justification for the admiralty rule is not applicable to railroad employees. In discussing seamen's releases, this Court mentioned that the adequacy of the consideration and the nature of the medical and legal advice available to seamen at the time of the execution of the release were relevant to an appraisal of the seamen's understanding of the release. In the footnote to this portion of the opinion, mention was made of the "somewhat comparable cases involving releases for personal injuries arising from non-maritime torts," in which connection the cases of *Union Pacific Ry. v. Harris,* 158 U. S. 326 (1895); *Chesapeake & Ohio Ry. v. Howard,* 178 U. S. 153 (1900); and *Texas & Pac. Ry. v. Dashiell,* 198 U. S. 521 (1905), were cited. In connection with petitioner's contention, it is interesting to note that the case of *Texas & Pac. Ry. v. Dashiell, supra,* is the only one of these cases involving a release executed by a railroad employee. In the *Dashiell* case, this Court affirmed a judgment for the plaintiff on the basis of the construction of the language of the release there involved, which was construed as covering only the injuries enumerated in the release and not the plaintiff's impaired mental powers and loss of sight, neither of which was mentioned in the release. The case is clearly not "on 'all fours' " here, as petitioner contends (Petitioner's brief, p. 16) since in the instant case there is no question concerning the meaning of the all-inclusive language of the release, and the issue is simply whether or not the evidence presented by the petitioner was sufficient to warrant avoidance of the release and whether the Trial Judge erred in withdrawing that question from the jury.

Petitioner also urges that the release involved in the instant case is invalid under the provisions of Section 5 of the Federal Employers' Liability Act , 45 U. S. C. A. Sec-

tion 55 (Petitioner's brief, pp. 18-20). This provision of the Act invalidates contracts, the purpose or intent of which is to enable a common carrier to exempt itself from liability created by the Act. In support of this contention, petitioner cites the case of *Duncan v. Thompson*, 315 U. S. 1 (1942), but the decision in that case does not touch on the issue here presented and this Court expressly reserved in that decision the question of whether or not Section 5 places any limitation on the validity of compromises or agreements of settlement of claims arising under the Federal Employers' Liability Act. The language of the Section of the Act relied on by the petitioner indicates quite clearly that settlement and release transactions are not affected by it. Thus the use of the word "exempt" implies an avoidance of all liability or of any payment on account of liability rather than a compromise resulting in a payment to the claimant. The decision in *Duncan v. Thompson, supra,* settled, once and for all, the question of whether or not a contract entered into after the date of injury could constitute a violation of Section 5. However, it did not affect the authority of earlier decisions to the effect that Section 5 does not operate to invalidate compromises and settlements of an employee's claim under the Federal Employers' Liability Act. **Bay State Dredging & Contr. Co. v. Porter, 153 F. 2d 827 (C. C. A. 1st, 1946); Culver v. Kurn, 354 Mo. 1158, 193 S. W. (2d) 602 (1946).** For cases announcing the same rule prior to the decision in *Duncan v. Thompson,* supra, see **Central of Ga. Ry. v. Hoban, 24 Ga. App. 686, 102 S. E. 46 (1920); Patton v. Atchison T. & S. F. Ry., 59 Okla. 155, 158 Pac. 576 (1916); Ballenger v. Southern Ry., 106 S. C. 200, 90 S. E. 1019 (1916).**

As was stated in **Patton v. Atchison T. & S. F. Ry., supra, 59 Okla. 156, 158 Pac. 577:**

> "If the contention of plaintiff that such a settlement is in conflict with the Federal Employers' Lia-

> bility Act be true, every injury to a railroad employee falling within the terms of that act must inevitably be brought to the courts for settlement, for if settlement in the sum of $100 be invalid, one in the sum of $10,000 would be equally so. To hold with the plaintiff would be to preclude the possibility of any settlement between the injured employee and the railroad company out of the courts."

Certainly, had Congress intended to invalidate all settlements of claims arising under the Federal Employers' Liability Act, it would have used language more clearly indicating such a drastic purpose. The construction of Section 5 urged by the petitioner would, it is submitted, be most harmful to railroad employees seeking to compromise legitimate claims and would compel them, in every case, no matter how minor the injuries involved, to resort to the courts.

Petitioner also urges that, since Congress has legislated with respect to seamen's releases in such manner as to indicate that the burden of sustaining those releases is on the employer, the same result should apply as to releases by railroad employees, as to which Congress has not legislated (Petitioner's brief, pp. 20, 21). It is difficult to follow the logic of petitioner's argument in this respect. On the contrary, it would seem that, since Congress has seen fit to legislate concerning seamen's releases but has chosen not to legislate concerning railroad employees' releases, it is the intention of Congress that releases by railroad employees shall be subject to the same rule as are releases in all other situations about which there has been no legislation. Petitioner's argument seems, in effect, to ask this Court to legislate on the subject, the Congress not having done so.

II. The Circuit Court Properly Granted a New Trial Because the Charge of the Trial Judge Improperly Assumed the Existence of a Fact Which, Under the Evidence, Was an Issue for the Jury.

The second reason for the Circuit Court's grant of a new trial was the fact that the Trial Court's instructions with respect to the effect of the release assumed a point which was properly an issue for the jury. The Trial Judge had charged (R. 281a, 282a):

> "Anyhow, they settled to the extent of $250.00, and the release has been offered in evidence and admitted, and *both sides agree that that release was not in contemplation of any sort of permanent injury.*
>
> "Now, members of the jury, you cannot agree to something you don't know anything about and didn't intend to cover. I want to make this statement, and I hope that the defendant will not object to it, because I can't imagine that a responsible and reputable employer, whether individual or corporate, would knowingly, . . . knowingly, . . . commit a fraud on an employee. I think *if it had been known that this man had these permanent injuries* Mr. Veidt would not have handled the matter; it would probably have gone to Chicago where Mr. Callen said he was sent when he couldn't settle for $500.00. Therefore that release was given and taken, and Mr. Callen received $250.00.
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> • • •
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> "The release, as I have told the attorneys for both sides, I do not consider binding *insofar as it applies to his permanent injuries, because the Pennsylvania Railroad certainly didn't know he was permanently injured, and if they did know he was permanently injured* and settled for $250.00 the comment of the Court might be entirely different." (Emphasis supplied.)

Thus the instructions assumed, without qualification, that petitioner was permanently injured, and they were duly excepted to by respondent on this point (R. 295a, 296a). The Circuit Court, in discussing this portion of the charge, stated (R. 318):

> "Though the permanency of appellee's injuries was one of the controverted issues both in the pleadings and at the trial, *the District Judge* in his charge *mistakenly advised the jury* in the above noted instructions *that appellee had been permanently injured and that this was conceded by the appellant.* After so doing, the Court said to the jury, 'I am going to leave you to pass judgment upon how far this man had been impaired, whether partially impaired, whether partially impaired permanently or whether he is impaired in his earning capacity at all. I am going to leave that entirely to you. * * * I am going to leave you to say in your experienced judgment just how far he has been impaired.'
>
> "Again, while the Court obviously made a sincere attempt to present to the jury the real status of the permanent injury claim, *we do not think that the rather vague language used actually eliminated the harm of the previous positive statements.* The amount paid in settlement had been $250. The verdict was in the sum of $24,990. The wide disparity between the two figures may or may not be some indication that the jury did not understand that the Trial Judge meant to contradict what he had said at least three times in the same charge. In any event it does seem that *the Court's final instruction regarding the injuries was hardly sufficient to fully counteract the unfair result of the inadvertent misstatements of appellant's position in this respect.*" (Emphasis supplied.)

An instruction is improper which assumes the existence of a fact which, under the evidence, is an issue for the jury.

Reading Company v. Larkin, 114 F. (2d) 416, 420 (C. C. A. 3rd), cert. den. 311 U. S. 707 (1940); Carpenter v. Connecticut General Life Insurance Company, 68 F. (2d) 69 (C. C. A. 10th, 1933). Whether or not petitioner's injuries were permanent was an issue raised both in the pleadings (R. 4a-8a) and in the evidence. Dr. Jepson, who testified for the petitioner, stated that he could not say whether or not the injury was permanent, and further stated that petitioner's youth enhanced his chances of recovery (R. 117a). Respondent at no time conceded that petitioner's injuries were or are permanent.[1] Thus the assumptions made by the Court that petitioner did, in fact, have permanent injuries and that the release was not intended to cover such injuries, was improper and highly prejudicial. Whether or not the petitioner was permanently injured was clearly for the jury to determine, both in deciding whether or not the release was executed under a mutual mistake of fact and in passing on the amount of petitioner's recovery, if any.

Petitioner asserts that the Trial Judge's charge in this respect is correct under the decision in the case of *Texas & Pac. Ry. v. Dashiell, supra,* 198 U. S. 521. However, as has already been pointed out, that case involved the construction of the language of a release, which language was construed, both by the Trial Court and this Court, as not

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[1] Apparently, the Trial Judge misunderstood the testimony of respondent's claim agent, Mr. Veidt. In qualifying respondent's sixth point for charge, the Trial Judge stated: "Mr. Veidt said he didn't know he was permanently injured, ..." (R. 289a). Veidt did not testify that at the time of the execution of the release "he didn't know he (petitioner) was permanently injured." What Veidt testified was that when the release was executed he did not know that the petitioner was suffering from the injuries that petitioner's witnesses had described during the trial of the case (R. 256a). This was not an admission that the injuries were permanent, since the doctors testifying for petitioner at the trial had disagreed as to whether or not the injuries were permanent.

including or covering the injuries complained of in that suit. There is no suggestion that the terms of the release here did not cover all injuries, whether temporary or permanent, so that the *Dashiell* case is not in point. Since petitioner's own expert witness, Dr. Jepson, described by the petitioner as a "famed Philadelphia orthopaedic specialist" (Petitioner's brief, p. 7) was unwilling to testify that the petitioner's injuries were permanent (R. 117a, 118a), it is clear that the statement that both sides agreed that the injuries were permanent was most prejudicial to the respondent's case and, as was suggested by the Circuit Court, may be the explanation for the large verdict which was rendered (R. 318).

III. The Circuit Court Properly Granted a New Trial Because of Errors in the Charge of the Trial Court Which Were Duly Raised at the Trial and on Appeal.

Petitioner urges that the Circuit Court granted a new trial on a ground not raised by the respondent, either at the trial or on the appeal (Petitioner's brief, pp. 7, 8, 10, 11, 13). His argument on this point is not sustained by the record, and is based on a misconception of the grounds of the decision of the Circuit Court of Appeals.

As is pointed out in the opinion of the Circuit Court (R. 315-318), the Trial Judge, in his charge, advised the jury that the release was not binding as to permanent injuries and, in addition, stated that "both sides agree that the release was not in contemplation of any sort of permanent injury" (R. 281a). The points for charge submitted by the respondent in connection with the release were all predicated on the proposition that it was for the *jury* to decide the issue of whether or not the release should be avoided because of mistake or fraud (Respondent's points for charge Nos. 4, 5, 6, 7 and 8—R. 299a, 300a). Thus, in submitting its points for charge, respondent's position was made entirely clear, and the charge given by the

judge was completely inconsistent with the points requested by the respondent.

At the conclusion of his charge, the Trial Judge read and affirmed the inconsistent points for charge, qualifying, however, the sixth point, which was directly related to the respondent's contention concerning the release (R. 289a). The sixth point for charge was to the effect that, if the petitioner had been advised that he had not been cured at the time he executed the release and that further treatments would be required, then the release was binding on the petitioner and the jury's verdict must be for the respondent (R. 300a). The evidence showed that, several months prior to the time when the release transaction was entered into, petitioner had been examined by Dr. Sheets, his family physician, whose examination at that time showed the same condition complained of at the trial (R. 124a-128a), and had received a report from the doctor who was treating him (dated the day previous to the day on which the release was executed) showing that the petitioner was not discharged, was suffering from nerve pressure and inflammation in the sacroiliac and lower lumbar region of the spine and had a weakness which was susceptible to recurrence (Defendant's Exhibit 3, R. 259a, 274a). This was the evidence covered by respondent's sixth point. The court, however, qualified that point with the following statement (R. 289a):

> "Members of the jury, I affirm that point with this explanation, if you believe that at the time the plaintiff executed the release *he had been advised by his own doctor that he had not been cured and that he believed he had not been cured—I don't know what evidence there is,* I will leave that entirely to you, as to what the doctors have advised this man at the time he consulted with Mr. Veidt, that he had not been cured. But, *he did state he didn't know he was permanently injured, and Mr. Veidt said he didn't know he was permanently injured,* and they both settled on the basis of

loss of wages and expenses and because Mr. Veidt felt there was no liability and that it was just a local matter. With that explanation, I affirm that point. *If he believed and he knew full well he was injured the way he is today* and he made a settlement for $250.00, *then he would be bound by it.*" (Emphasis supplied.)

Thus, even if it could be contended that the affirmance of respondent's points for charge would have cured the errors committed in the charge, namely the failure to submit the questions of the permanence of the injury and of mistake as to the release to the jury, it is clear that the qualification of the sixth point for charge did not properly present the release question to the jury. The Court's comments carried the implication that there was no evidence that petitioner had been advised by his own doctor that he had not been cured, although the evidence on this point was contained in a report from petitioner's doctor which he testified he had obtained and brought to respondent's claim agent (R. 60a, 61a). The court's comments mistakenly referred to Mr. Veidt as having testified that "he didn't know he (petitioner) was permanently injured", whereas Mr. Veidt had merely stated that "I didn't know he had the injuries the doctors described in this court room" (R. 256a) and the doctors, in their testimony, had disagreed as to whether or not the injuries were permanent. Furthermore, the court's qualification of the point was, in effect, a statement that, unless, at the time the release was executed, petitioner believed he had not been cured and believed he had the very injury described at the trial (regardless of the advice shown to have been given to him by his own doctor), the release should be avoided. This was an erroneous statement of the law, in that it suggested that testimony as to petitioner's subjective belief concerning the nature of his injury could be accepted by the jury as a sufficient ground for avoidance of the release, although contradicted by the written report of his own doctor which had been obtained

by petitioner before the release was executed. Respondent duly excepted to the qualification of this point for charge (R. 293a) so that the question was properly raised at the trial and consequently was available to the respondent in connection with the appeal to the Circuit Court.

Rules 46 and 51 of the Rules of Civil Procedure for the District Courts of the United States make it clear that the policy of the rules is merely that the Trial Court be apprised of the action which any party desires the court to take, and the grounds therefor. It cannot be doubted that respondent, both in its requests in the points for charge and in the exceptions taken to the Trial Judge's charge, made it clear to the Trial Court that it desired to have the issue concerning the effect of the release submitted to the jury, under proper instructions. Respondent's motion for a new trial assigned as error the court's instructions concerning the effect of the release (R. 305a). The same question was raised in respondent's statement of points on which it intended to rely on appeal, and respondent's brief in the Circuit Court raised, as the first question involved (Appellant's brief below, p. 1), the propriety of the charge concerning the release, the major part of respondent's argument in the Circuit Court being devoted to this point (Appellant's brief below, pp. 6-16). As has been shown, the grant of a new trial by the Circuit Court was based, mainly, on the failure of the Trial Judge to submit to the jury the issue of mistake in the execution of the release (R. 317). This question was duly raised by the respondent, both before the Trial Court and on appeal.

It is an over-simplification of the Circuit Court's opinion to contend, as the petitioner does, that the sole basis for the decision was the erroneous charge as to the effect of the release (Petitioner's brief, pp. 3, 4, 7, 10, 25, 26). As is pointed out in the Circuit Court's opinion (R. 318), the Trial Judge mistakenly advised the jury that petitioner had been permanently injured and that respondent conceded this fact. The Circuit Court considered another por-

tion of the charge which was claimed by petitioner to have corrected the error and then stated (R. 318):

> "In any event it does seem that the court's final instruction regarding the injury was hardly sufficient to fully counteract the unfair result of the inadvertent misstatements of appellant's position in this respect."

Thus the grant of a new trial by the Circuit Court was occasioned not only by errors concerning the release but by the misstatement of respondent's position regarding the permanence of the injury, which misstatement was duly excepted to be the respondent at the trial (R. 295a, 296a), was included in the sixth reason for a new trial in respondent's motion for a new trial (R. 305a), was included as one of the questions involved in appellant's brief in the Circuit Court (Appellant's brief below, p. 1) and was argued both in the briefs and at the oral argument before the Circuit Court (Appellant's brief below, pp. 16, 17).

Even if it could be contended that the grant of a new trial by the Circuit Court was not based on errors duly raised by exceptions at the trial, it is clear that the Circuit Court has power to direct a new trial for fundamental errors and to prevent a miscarriage of justice, although the errors were not properly raised in the Lower Court. **Sibbach v. Wilson & Co., 312 U. S. 1 (1941); Hormel v. Helvering, 312 U. S. 552 (1941); Shokuwan Shimabukuro v. Higeyoshi Nagayama, 140 F. 2d 13 (Ct. App. D. C. 1944).** Thus if there had been no exceptions whatever supporting the questions argued before the Circuit Court in this case, the great confusion resulting from the misstatements and contradictions in the charge would have fully justified any court in directing a new trial.

IV. A New Trial Should Have Been Granted Because the Charge Was Unduly Prejudicial to the Respondent and Unduly Favorable to the Petitioner and Because the Trial Court Erred in Refusing to Withdraw a Juror at Respondent's Request.

At the conclusion of the Trial Judge's charge, respondent excepted to the charge as being unduly favorable to the petitioner, emphasizing the petitioner's case and being prejudicial to the respondent (R. 297a). A careful reading of the entire charge shows the merit of this exception. In this connection the portions of the charge already discussed concerning the effect of the release and the permanence of the injury should, of course, be considered. In addition, there were other salient features of the charge which require comment. Although it may well be that no one of the portions of the charge to be discussed, standing by itself and considered alone, would constitute prejudicial error, it is submitted that the cumulative effect of all of these errors was to prejudice the respondent and to deprive it of a fair trial.

One of these errors was the misstatement in the charge that, at the time of the coupling when petitioner claimed to have received his injury, the regular engineer had testified that he braced himself expecting a possible jar (R. 279a). Examination of the testimony of the regular engineer, Mr. Hirschmann, fails to reveal any such statement. On the contrary, his testimony was as follows (R. 219a):

> "Q. Do you remember anything about the coupling that was made when you coupled to the other cars?
>
> "A. I was standing right in the middle of the deck. The pilot was going very slow, and I was standing there, and I figured we might be close to the cars, and I was waiting for them to stop, or whatever was going on, and when he stopped I said to him, 'Did you make it?' just like that,—I didn't feel any jar of any kind, and then I proceeded pulling more clinkers.

"Q. Would you say anybody on the engine was jostled, or anything?

"A. I know I wasn't. I was standing right in the middle with the hook, and if it had hit hard I would have went one way or the other, off balance."

Thus, the gist of the engineer's testimony was not that he braced himself for the coupling but rather that he was standing in an insecure and unbraced position, so that if a hard coupling had been made he would have been thrown off balance. The Court's attention was called to this misquotation of testimony at the conclusion of the charge (R. 295a), but the charge was not corrected. Certainly, where the question of negligence depended solely on whether or not the coupling operation was effected at a high rate of speed, the misquotation of testimony having a direct bearing on the point constitutes a proper basis for the granting of a new trial.

Another error was the statement by the Trial Judge that the petitioner had been an employee of the respondent for sixteen years (R. 279a). This was an error, since, in point of fact, the petitioner had been employed by the respondent for less than three years (R. 13a). The length of time petitioner had worked for respondent was not relevant to any issue in the case and the erroneous statement of the Trial Judge was prejudicial to the respondent in that it tended to excite sympathy for the petitioner, particularly with regard to the question of whether or not petitioner had been imposed upon in connection with the release.

In discussing the question of contributory negligence, the Lower Court stated (R. 283a):

"The company *is not free from liability* but if he contributed to it himself, why, then, any amount that would otherwise be awarded, would be diminished accordingly." (Emphasis supplied.)

The statement that "the company is not free from liability" was certainly most misleading to the jury. Liability was

never conceded by the respondent. The quoted portion of the charge was tantamount to the giving of binding instructions on the question of respondent's liability, leaving for the jury's determination only the questions of contributory negligence and amount of recovery. The record in this case is devoid of any justification for such an instruction.

One instance of the same type which occurred during the course of the trial should also be considered since it, as well as the objectionable portions of the charge itself, tended to confuse the jury and distort the issues in the case.

During the testimony of respondent's conductor, C. E. Crum, he was asked by the court whether or not it was good railroading for a brakeman to ride on the stirrup (or step) of a tender when running against traffic, and his reply was that with a light engine and a tank (or tender) it was not good railroading (R. 165a, 166a). The court then remarked (R. 166a):

> *"I don't know how the passengers would feel. I think we would feel more secure if they followed the other method.* If you disagree, we will have the jury take both phases of it." (Emphasis supplied.)

The court's remark was objected to for the reason that there was no question of passengers in the instant case and that, obviously, passengers could have nothing to do with the movement of a "light" freight engine. In response to respondent's objection, the court aggravated the situation by saying (R. 167a):

> ". . . *I say that passengers might have a very different idea whether or not, in the interest of safety, that was or was not good railroading.*" (Emphasis supplied.)

When the question of passenger safety was again injected into the case by the court, respondent moved for the withdrawal of a juror. The motion was declined.

The court's comments concerning the safety of passengers and what passengers might think of the matter were most uncalled for. Petitioner was a brakeman on a freight train and, according to his testimony, was injured in the course of a coupling operation between a freight engine and tender and some freight cars. No passenger train was involved and the Trial Judge's comments concerning passengers were completely unrelated to the issues in the case. Naturally, the Judge's remarks tended to confuse the issue in the minds of the jury since they indicated that a question of passenger safety was involved and hence invited the jury to view the transaction, not impartially, but as if they were passengers on a train near the scene of the accident. Moreover, the suggestion of what passengers might think of the practice was an invitation to the jury to give consideration to lay opinion on a technical matter of railroad operation, and since a "passenger" could not have been called as a witness to express his opinion on this subject, speculation as to what such opinion might be was highly improper. It is accordingly submitted that the court abused its discretion in not withdrawing a juror as requested.

In describing the accident the court in its charge said (R. 276a):

> "There were 80 cars in this train, which was being pulled by one of the largest engines of the Pennsylvania Railroad, and that means one of the largest engines in the country, because the Pennsylvania Railroad is up to date and progressive in its equipment and everything that goes to make *one of the most successful railroads in the world.*" (Emphasis supplied.)

The remarks concerning the Pennsylvania Railroad, although complimentary, were completely unrelated to the issues in the case and served only to suggest its wealth

and ability to pay a large verdict. Cf. **New York Central Railroad Company v. Johnson, 279 U. S. 310, 319 (1929); London Guarantee and Accident Company v. Woelfle, 83 F. (2d) 325, 340 (C. C. A. 8th, 1936).**

The Trial Judge, in discussing petitioner's testimony, stated (R. 277a):

> "He took this witness stand and *laid his hand on the Book,* and he told you who he was, what he was, and his version of this occurrence. You watched him, and I watched him. Now then, in your opinion, was he telling the truth from his viewpoint as far as he was able to tell, bearing in mind all these elements that I referred to, was he telling the substantial truth or was he manufacturing something out of the whole cloth? Because, members of the jury, *if he came here and put his hand on that Book and deliberately told you of an incident that never happened,* then there is nothing in this case and you need not worry any about it." (Emphasis supplied.)

There was virtually no discussion, in the charge, of the testimony of any of respondent's witnesses, so that the Trial Judge did not allude to the fact that respondent's witnesses had, similarly, placed their hands on the Book. The emphasis on the fact that petitioner placed his hand on the Book stressed unduly petitioner's version of the accident and tended to distract the jury from careful consideration of the differences between the testimony of the petitioner and the testimony of respondent's witnesses. Although, in response to an exception by the respondent to this portion of the charge, (R. 293a) the Trial Judge pointed out that all of the witnesses had taken the same oath, it is submitted that the effect of the initial emphasis on petitioner's placing his hand on the Book could not be overcome in such manner in response to exceptions by counsel.

In the same vein, the Court said (R. 282a), in commenting on the testimony of the petitioner and his doctors concerning petitioner's injuries:

> "You heard this statement, and *he was put under cross-examination;* he told you the kind of work that he can do and can't do, and the doctors have testified, and you know all about that more than anybody can tell you; *neither side can tell you any more than they have done.*" (Emphasis supplied.)

Although the meaning of this statement is not entirely clear, it places undue emphasis on the fact that petitioner was subject to cross-examination, thus seeming to imply that his testimony in this regard was entitled to great weight; and in stating that neither side could tell more than petitioner's doctors and the petitioner had told, the testimony of petitioner and his witnesses was singled out and emphasized as if it were unimpeachable, whereas there was nothing in the evidence to warrant a statement or assumption that nothing more (or nothing more accurate) could have been presented to the jury by the petitioner.

In several portions of the charge the Trial Judge stressed the fact that the operation of dividing the train into two parts was an unusual occurrence (R. 276a, 277a) although petitioner claimed to have received his injury, not because of such occurrence, but merely because, in the ordinary and simple operation of coupling a tender to some standing cars, the tender and its engine approached the cars at too high a speed. He further commented concerning the hazards of petitioner's occupation in a manner which, it is submitted, had a tendency to excite the sympathy of the jury. Thus he stated, in describing the work of petitioner and his fellow employees (R. 277a):

> ". . . *they risk their lives day and night* and the *common hazard* or the common cause tends to bring them somewhat together. *They are out on the firing line* . . ." (Emphasis supplied.)

Other portions of the charge again alluded to the hazards of petitioner's occupation (R. 278a, 284a). These comments were, it is submitted, unnecessary and unwarranted and served only to excite sympathy for the petitioner.

In commenting on the question of the release, the Trial Judge said (R. 281a):

> "I want to make this statement, and I hope that the defendant will not object to it because *I can't imagine that a responsible and reputable employer,* whether individual or corporate, *would knowingly—knowingly—commit a fraud on an employee.*" (Emphasis supplied.)

This portion of the charge was duly excepted to by the respondent (R. 296a), but it was not corrected. It had not been contended by the petitioner that the release was obtained by fraud and, as even the Trial Judge recognized in his opinion dismissing respondent's motion for new trial (R. 310a), there was no evidence of fraud and the issue of fraud was not raised by the pleadings.[2] Thus the court's remarks were not called for in connection with any issue in the case. It is respectfully submitted that the court's comment concerning fraud was not only unjustified but was inflammatory and highly prejudicial to the respondent.

The court also said, in discussing the release (R. 282a):

> ". . . and if they did know he was permanently injured and settled for $250.00 *the comment of the Court might be entirely different.*" (Emphasis supplied.)

Certainly the implication of this remark was most unfavorable and prejudicial to the respondent and was, furthermore, in complete disregard of the testimony of Mr.

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[2] The suggestion of fraud, at page 25 of petitioner's brief, is likewise most improper and uncalled for, since the issue of fraud was not presented by the pleadings or the evidence and was not even suggested by the petitioner, at the trial.

Veidt to the effect that the settlement figure was based not on the nature of petitioner's injuries, but on the fact that petitioner's own statement concerning the accident showed no liability on respondent's part (R. 248a, 251a, 253a, 256a, 257a). In such a case it would be entirely proper to effect a settlement for a small amount, no matter what the injuries were.

In addition to the portions of the charge discussed above, which were objectionable for the reasons already stated, it is submitted that an examination of the charge as a whole reveals that it gave undue prominence to petitioner's testimony, both as to how the accident occurred and as to how the release was executed, whereas virtually no reference was made to the testimony of respondent's witnesses either as to how the accident happened or as to the release. It seems most probable that the distorted emphasis in the charge indicated to the jury that the petitioner's testimony should be accepted and the testimony of the respondent rejected so that a verdict should be returned for the petitioner.

Although the Circuit Court stated, in its opinion, that it did not find any "substantial error" in connection with these points, it appears probable that the cumulative effect of the errors in the charge which have been referred to, and the refusal to withdraw a juror as requested, together with the errors in the charge concerning the release and the permanency of the injury, serve to explain the unusually high verdict which was rendered, as well as the fact that a verdict was rendered for the petitioner rather than for the respondent.

It is submitted that the prejudicial nature of the charge and the refusal to withdraw a juror were of such importance and gravity as to warrant the granting of a new trial. These points having been raised on the appeal to the Circuit Court are, of course, still open to the respondent in this court without a cross-petition for certiorari. **Langnes v. Green, 282 U. S. 531, 534-539 (1931); Walling v. General Industries Co., 330 U. S. 545, 547 (1947).**

CONCLUSION.

It is submitted that the grant of a new trial by the Circuit Court, in the instant case, should be affirmed for the reasons stated by that court, namely the failure to submit to the jury the issue of mistake in the execution of the release and the erroneous assumption in the charge that petitioner's injuries were permanent; the grant of a new trial should also be affirmed because the charge was unduly favorable to the petitioner and prejudicial to the respondent, and because of the Trial Court's refusal to withdraw a juror on respondent's request.

Respectfully submitted,

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